RECORD AND BRIEFS

FILED
SEP 7 2017

No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., *et al.*,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeals of Colorado

BRIEF OF *AMICUS CURIAE* CHRISTIAN BUSINESS OWNERS SUPPORTING RELIGIOUS FREEDOM IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

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STATEMENT OF IDENTITY AND INTERESTS OF THE *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae*, Christian Business Owners Supporting Religious Freedom, respectfully submit this brief. *Amicus Curiae* urge this Court to protect the religious freedom enshrined in the First and Fourteenth Amendments of the United States Constitution, federal law, and state law.[1]

Amicus Curiae, Christian Business Owners Supporting Religious Freedom, has a significant interest in the protection of the constitutional rights and religious freedom of business owners nationwide. *Amicus Curiae* are faithful Christians who strive to conduct their business operations with integrity and in compliance with the teachings, mission, and values of the Holy Bible. *Amicus Curiae* believe that business owners have the freedom to conduct their business in a manner that does not violate their sincerely held religious beliefs and that follows the principles of their religious faith.

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[1] Petitioners and Respondent Colorado Civil Rights Commission granted blanket consent for the filing of *amicus curiae* briefs in this matter, as reflected on this Court's docket. Respondents Charlie Craig and David Mullins specifically granted consent to *Amicus curiae* for the filing of this brief. Pursuant to Rule 37(a), *Amicus curiae* gave 10-days' notice of its intent to file this brief to all counsel. *Amicus curiae* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Amicus Curiae include three business owners who have been forced to file lawsuits to preserve the exercise of their Christian beliefs without suffering crippling fines and other oppressive actions by the government: Thomas R. Beckwith, Dick Odgaard, and Betty Odgaard.

1) Thomas R. Beckwith

Thomas R. Beckwith is a faithful Southern Baptist who runs Beckwith Electric Co., Inc. in accordance with his Christian beliefs. Thomas R. Beckwith, therefore, exercises generosity and care for his employees. Thomas R. Beckwith offers an extensive employee benefits package, equal for all employees, pays his employees above market wages, and does not unjustly discriminate against anyone in his hiring. Thomas R. Beckwith provides donations to various charities, including religious causes, crisis pregnancy centers, schools, missions, hospitals, hospices, political endeavors, and churches.

Thomas R. Beckwith's family traces its history to the inception of the United States of America. Thomas R. Beckwith is a descendant of the Beckwiths, who in 1626 endured the hardships of a lengthy and storm-ridden voyage to the shores of America on a 40-foot boat called the "Sparrow Hawk" to escape religious persecution from England. In 2012, Thomas R. Beckwith found himself facing annual fines of 4.6 million dollars for the exercise of his Southern Baptist faith. *See Beckwith Electric Co., Inc. v. Sebelius*, 960 F.Supp.2d 1328 (M.D. Fla. June 25, 2013). Five years later, Thomas R. Beckwith is still fighting for his religious freedom in federal court. *Beckwith Electric*

Co., Inc. v. Sebelius, Case No. 8:16-cv-01944-MSS-JSS, Compl. (M.D. Fla. July 5, 2016).

2) Dick and Betty Odgaard

Dick and Betty Odgaard are a faithful Mennonite couple who ran Go¨rtz Haus Gallery, a former church converted into a small art gallery, bistro, and flower shop in Iowa. Dick and Betty Odgaard strived to operate Go¨rtz Haus Gallery consistent with their Mennonite faith, which follows the biblical understanding of complementarianism of the sexes, homosexual acts, and marriage.

Dick and Betty Odgaard hosted wedding ceremonies in the sanctuary portion of the former church. On August 3, 2013, a same-sex couple contacted Dick and Betty Odgaard requesting that the Odgaards host the same-sex couple's wedding ceremony. Because the request directly violated biblical teachings and the Odgaards' Mennonite faith, Dick and Betty Odgaard declined to host the wedding. The Odgaards hold no animus toward homosexual persons, and happily employed and served homosexual persons for years at Go¨rtz Haus Gallery. Dick and Betty Odgaard simply could not participate in certain acts prohibited by their sincerely held religious beliefs.

The next day on August 4, 2013, however, the same-sex couple filed a complaint alleging sexual orientation discrimination against the Odgaard's gallery before the Iowa Civil Rights Commission. The charges pursued by the Iowa Civil Rights Commission forced Dick and Betty Odgaard to shut down Go¨rtz Haus Gallery. They were targeted by a media campaign, hate mail, boycotts, personal attacks, and death threats. After

fighting against this religious persecution in the Iowa state court and appealing to the Iowa Supreme Court, Dick and Betty Odgaard exhausted all available legal remedies without finding relief. *Odgaard, et al. v. Iowa Civil Rights Comm'n, et al.*, Case No 14-0738, Op. (Iowa Sup. Ct. Jan. 14, 2015).

Amicus Curiae, Christian Business Owners Supporting Religious Freedom, oppose the opinion of the Colorado Court of Appeals because it unlawfully violates the constitutionally protected rights of Petitioners and the protected rights of all business owners across the country to act, speak, and live out their Christian faith as free Americans. The Colorado Court of Appeals has dangerously misapprehended the meaning of religious freedom and our inalienable rights enshrined in the First and Fourteenth Amendments to the Unites States Constitution. Refusing to kneel at the altar of the State and opposing the unjust rulings of the lower courts that trampled the liberty of Petitioners and set dangerous precedent for all Americans, *Amicus Curiae* file this brief to support the arguments of the Petitioners.

BACKGROUND

Petitioner Jack Phillips is a Christian business owner who endeavors to follow God's teachings, not just on Sundays in some of his actions, but each day in all of his actions, as the Bible instructs. Cert. App. 274a, 281-283a, ¶¶ 7-8, 49-61 (hereinafter "App."). Mr. Phillips owns Masterpiece Cakeshop, a bakery that, *inter alia*, creates custom wedding cakes. App. 282-283a, ¶¶ 57-58, 62. Mr. Phillips established business practices for his bakery in accordance with his Christian faith. For example, Petitioners do not open

for business on Sundays to observe the Sabbath, pay employees generous wages, and provide assistance with personal needs. App. 281-283a, ¶¶ 50-58. Further, and at issue here, Petitioners do not utter language, create expressions, or participate in acts, events, and ceremonies contrary to the Christian faith. App. 282-283a, ¶¶ 57-58, 62. Petitioners abstain from creating products that communicate profane, indecent, racist, or anti-Christian messages or that are involved in objectionable events, such as the pagan holiday of Halloween. App. 283-284a, ¶¶ 59, 61, 63-64.

Petitioner Jack Phillips' Christian faith follows biblical teaching and instructs that marriage is a sacred bond exclusively between one man and one woman. App. 274- 275a, ¶¶ 10-15. Mr. Phillips' religious faith requires that he abstain from promoting, participating in, or celebrating homosexual acts, including the celebration of romantic same-sex relations in the form of a wedding ceremony. *Id.*; *see also* Genesis 19:5-7, Leviticus 20:13, Romans 1:26-27, 1 Corinthians 6:9. Petitioners freely sell baked goods and cakes to all customers. App. 287a, ¶¶ 78, 79. Conflict only arises in narrow circumstances when a customer requests Petitioners to create—and therefore participate in—language, acts, or events that Petitioners must avoid according to their sincerely held religious beliefs. Such a request forces Petitioners to choose between violating the precepts of their religious faith and their religious identity, or violating the Colorado Anti-Discrimination Act ("CADA").

In July of 2012, Respondents contacted Mr. Phillips requesting that he create a custom cake for their same-sex marriage. Petitioner Jack Phillips explained to

Respondents that he was unable to create the cake because participating in the event would violate his sincerely held religious beliefs. Respondents timely obtained a wedding cake from a different baker, but they nonetheless filed charges of sexual orientation discrimination with the Colorado Civil Rights Commission against the Petitioners. App. 5a, ¶ 6; App. 289-291a. On September 4, 2012, Respondents charged Petitioner Masterpiece Cakeshop with violating CADA for declining to participate in the Respondents' same-sex wedding. App. 260-262a, 269-271a, 276a, 284-288a. Petitioners' religious objection is, and always has been, based solely on religious grounds, and not on any animosity toward Respondents or their sexual orientation. App. 281-284a, ¶¶ 50-59, 61, 63-64.

Respondents prosecuted the case before an administrative law judge, who rejected Petitioners' defense that creating a custom wedding cake contrary to his sincerely held religious beliefs violated his rights to religious freedom and free speech under the First and Fourteenth Amendments of the United States Constitution. App. 87-88a, 122-161a. The administrative law judge ordered Petitioner Jack Phillips to violate his religious beliefs and deny his religious identity by participating in same-sex weddings by baking custom cakes on demand. App. 56-58a. The administrative law judge also demanded that Petitioners train all of their employees to follow his order and to report any time Petitioners or any of their employees could not fulfill a cake or bakery order for any reason. App. 56-58a.

Petitioners appealed to the Colorado Court of Appeals, again explaining how being forced to bake the

wedding cake violated their rights of religious exercise and free speech. App. 97a, 106a, 108-09a, 122-161a, 202-205a, 208-239a. The Colorado Court of Appeals rejected Petitioners' arguments under the First and Fourteenth Amendments and upheld the commission's opinion that Petitioners unlawfully discriminated against Respondents and violated CADA. App. 12-45a. The Colorado Supreme Court denied review of Petitioners' case. App. 54-55a.

SUMMARY OF THE ARGUMENT

The Colorado Court of Appeals decision violates the personal liberty of Petitioners and requires reversal for four reasons. First, the First Amendment forbids the government from enacting a law that prohibits the free exercise of religion or abridges the freedom of speech. U.S. Const. amend. I. Inherent in these freedoms is the understanding that the government must allow its citizens to freely exercise and voice their religious and political beliefs without interference or punishment.

This Court affirmed this essential constitutional principal in *Cantwell v. Connecticut*, 310 U.S. 296, 300-311 (1940) to invalidate a State law prohibiting a group of Jehovah's witnesses from proselytizing door-to-door. This Court found that the First Amendment freedoms of religious exercise and free speech outweighed the State's interests in controlling solicitations and public order. *Id.* The Court championed religious and political discourse and disagreement as evidencing liberty in an enlightened society. *Id.* at 310; *see also W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943).

The Colorado Court of Appeals decision violates Petitioners' free exercise of their religious faith because it forces Petitioners to choose to either: (1) violate religious beliefs that are central to their religious identity, or (2) face prosecution under CADA. Under the Free Exercise Clause, the State may only pass a law that burdens religious exercise when the law is facially neutral and of general applicability. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2756 (2014). When a law specifically burdens a particular religious belief, however, it is not neutral or generally applicable, and therefore must be "justified by a compelling governmental interest" and be "narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531-32. Respondents' application of CADA is not justified by a compelling governmental interest and is not narrowly tailored. Respondents' right to purchase a custom wedding cake from a specific baker is less important than Petitioners' constitutional rights under the First and Fourteenth Amendments. Respondents' application of CADA therefore violates Petitioners' constitutional rights.

Second, the lower court's opinion contradicts this Court's precedent regarding the weight accorded to free exercise and free speech concerns when these liberties conflict with a State public accommodations law. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568-81 (1995). The *Hurley* Court held that a State must not interfere with these important liberties or compel an individual to espouse a belief contrary to his or her religious beliefs "however enlightened [the] purpose may strike the

government." *Hurley*, 515 U.S. at 579. The Colorado Court of Appeals opinion cannot be squared with *Hurley*, and this Court should reassert the important constitutional principles protected by that holding.

Third, the Colorado Court of Appeals' ruling unconstitutionally infringes on the liberty and equal protection interests recognized by this Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). This Court acknowledged a constitutional right of personal identity for all citizens, including the right to identify by the religious beliefs and practices central to one's identity. *Id.* at 2593, 2597; *see also Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2785-86 (Kennedy, J., concurring).

Lastly, the case law relied upon by Respondents ignores the vast majority of this Court's precedent that requires the protection of Petitioners' religious liberty. In order to uphold and protect the liberty rights promised to all Americans by the First and Fourteenth Amendments, this Court must reverse the holdings of the lower court.

ARGUMENT

The beacon of liberty fails to shine when religious freedom dies on the pulpit of the civil authority's demands to supplant its will and opinion of morality for that of its citizens. The promise of liberty amounts to nothing more than empty subterfuge when the State punishes its citizens for the expression and exercise of their sincerely held religious beliefs. Persecution of religious freedom and religious identity, as the lower court imposed upon Petitioners, must not stand in the United States. The First Amendment, federal statutes,

and state statutes, promulgated in the name of religious tolerance and liberty, require a reversal of the Colorado Court of Appeals' oppressive and overreaching judgment.

The Colorado Court of Appeals agreed that Respondents, through the power of the State, can compel a devout Christian baker to participate in a same-sex marriage ceremony.[2] If this is correct, the American experiment is effectively over. For devout religious citizens, such a rule fatally erodes religious freedom, freedom of speech, protections for property rights, and the substantive due process right of dignity, autonomy, and identity. If government can compel citizens to dishonor God or else lose their livelihoods, we are far down the road to tyranny.

I. THE HISTORY OF AMERICAN FREEDOM ENSHRINED IN THE FIRST AMENDMENT DEMANDS THAT PETITIONERS NOT BE PUNISHED FOR EXERCISING THEIR SINCERELY HELD RELIGIOUS BELIEFS.

On December 15, 1791, Congress ratified the First Amendment of the United State Constitution as the foremost of the Bill of Rights. The text of the First Amendment states in pertinent part,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

U.S. Cont. amend I.

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[2] And the same could be done to any devout Jew, or Muslim, or other person who disagrees with Respondents on this issue.

In response to the early colonial establishments of religion in America and bearing witness to the intolerant laws of seventeenth century England that persecuted groups of religious individuals, such as Catholics, Puritans, and Baptists, the First Amendment balances the need for freedom of religion and speech with the need of a well-ordered central government. *See, e.g.*, Mark A. Knoll, A History of Christianity in the United States and Canada 25-65 (1992); F. Makower, The Constitutional History and Constitution of the Church of England 68-95 (1895 and photo. reprint 1972). The First Amendment embodies an ideal that is uniquely American—that true liberty exists only where men and women are free to hold and exercise conflicting religious and political beliefs. Under this aegis, the government must not interfere with its citizens living out their freedoms, but embrace the security and liberty only a pluralistic society affords.

This ideal is well demonstrated by *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the first case this Court analyzed upon incorporating the First Amendment's protection of free exercise through the Due Process Clause of the Fourteenth Amendment. In *Cantwell*, this Court invalidated a Connecticut statute requiring individuals to obtain a state license prior to making door-to-door religious solicitations. *Id.* at 303-11. The Petitioners, Newton Cantwell and his two sons, were Jehovah's Witnesses proselytizing in a predominantly Catholic neighborhood. *Id.* at 300–01. Petitioners distributed religious materials and played a phonograph record describing a book called "Enemies," which attacked the Catholic Church. *Id.* at 301. Petitioners' speech and actions were not well

received and offended men in the neighborhood. Id. at 302-03. One man even had to resist the temptation to hit the Petitioners. *Id.* Petitioners were charged and convicted of violating Connecticut's solicitation statute and a breach of the peace ordinance. *Id.* at 305-311.

Despite the offense and animosity Petitioners' actions aroused, this Court reversed Petitioners' convictions, holding that their conduct was protected by the Free Exercise Clause. *Id.* This Court avowed,

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 310.

Three years later, in holding that state action compelling a student to salute the American flag infringed upon a student's religious beliefs, this Court famously declared,

> [W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so

> harmless to others or to the State as those we deal with here, the price is not too great. ***But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.***

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943) (emphasis added).

The need for liberty and raring appeals for freedom remain just as important and relevant today, as when this Court first penned *Cantwell* and *Barnette*. *See, e.g.*, *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 169 (2002) ("The rhetoric used in the World War II-era opinions that repeatedly saved petitioners' coreligionists from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today.").

The Free Exercise Clause of the First Amendment still protects religious individuals from penalties and persecution due to the exercise of their sincerely held religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). This

First Amendment protection of religious exercise includes the right to abstain from actions that violate one's religious faith and identity. *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981). This right of abstention includes "[b]usiness practices compelled or limited by the tenets of a religious doctrine." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2756 (2014). Indeed, just three terms ago, this Court found that business practices motivated by one's religious faith "fall comfortably within the understanding of the 'exercise of religion' that this Court set out in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 877." *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2756. The Free Exercise Clause of the First Amendment protects Petitioners' right to abstain from certain business practices that directly violate their Christian faith. This Court must reverse the decision of the Colorado Court of Appeals that punishes Petitioners' religious exercise and forces Petitioners to forfeit their religious identity and autonomy.

II. THE FIRST AMENDMENT EXPRESSLY PROTECTS PETITIONERS' RELIGIOUS EXERCISE AND FREE SPEECH.

A. The First Amendment's Free Exercise Clause Requires Reversal.

"The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority." *Abington School District v. Schempp*, 374 U.S. 203, 222-23 (1963). As this Court recognizes, "This

principle . . . is so well understood that few violations are recorded in our opinions." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 523. Under the Free Exercise Clause, the State may only pass a law that burdens religious exercise when the law is facially neutral and of general applicability. *Id.* at 531. *However*, when a law burdens religious exercise and it is *not actually neutral or generally applicable*, it must be "justified by a compelling governmental interest" and be "narrowly tailored to advance that interest." *Id.* at 531-32.

In *Lukumi*, this Court determined that a law is not neutral or generally applicable when it "infringes upon or restricts practices because of their religious motivation," or "in a selective manner imposes burdens only on conduct motivated by religious belief." *Id.* at 533, 543. The Court emphasized that the Free Exercise Clause "forbids subtle departures from neutrality, and covert suppression of particular religious beliefs." *Id.* at 534 (internal quotations and citations omitted). Here, as in *Lukumi*, Respondents' application of CADA is not generally applicable because individuals who proscribe to different religious identities or individuals who disavow the Christian faith, such as agnostics or atheists, may freely continue their business practices while individuals who ascribe to Christianity and its strict adherence to its biblical teachings are specifically targeted and burdened. Since the Respondents' application of CADA targets individuals who share Petitioners' Christian beliefs, while leaving individuals of other faith persuasions untouched by the law's

prohibitions, it is not generally applicable and this Court should apply strict scrutiny analysis.[3]

Indeed, Respondents require that Petitioners choose between (1) disavowing the tenets of their religious faith central to their identity, or (2) facing prosecution under CADA, incurring financial penalties, and being compelled by the government to retrain their staff, formulate reports, and act contrary to their religious beliefs. This Court has repeatedly held that government mandates imposing such Hobson's choices on its religious citizens violate the First Amendment. *See Thomas*, 450 U.S. at 717 (holding the State must not require a religious individual to choose "between

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[3] If this Court were to find CADA is generally applicable, and thus potentially subject to the rule in *Employment Div. v. Smith*, that case would nonetheless be distinguishable on the very grounds cited by the *Smith* Court. This case involves "hybrid" rights of free speech, free exercise, and autonomous identity and dignity, as discussed below, and thus falls within the exception the *Smith* Court carved out based on cases such as *Cantwell*, *supra*, and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See Smith*, 494 U.S. at 881-82 (citing *Cantwell*, 310 U.S. at 304-307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) in conjunction with *Yoder*, 406 U.S. 205 (upholding constitutional right of parents, to direct the education of their children, while invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school); *Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *Barnette*, 319 U.S. 624 (invalidating compulsory flag salute statute challenged by religious objectors)).

fidelity to religious belief or cessation of work"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (invalidating the application of a regulation forcing a religious individual "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."); *Wisconsin v. Yoder*, 406 U.S. 205, 208, 219 (1972) (ruling that the State must not require an individual "to perform acts undeniably at odds with fundamental tenets of their religious belief."). This is the exact type of State action that the Free Exercise Clause forbids and that requires "the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546.

In order to pass strict scrutiny, Respondents must show that CADA was enacted to fulfill a compelling state interest involving the "high degree of necessity." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). "The State must specifically identify an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *See id.* at 2738 (citations omitted). Respondents must demonstrate "some substantial threat to public safety, peace, or order," or an equally compelling interest, that would be posed by exempting the Petitioners. *See Yoder*, 406 U.S. at 230.

Obtaining a cake from a specific baker is not an interest involving the "highest degree of necessity." On the contrary, the lower court record reflects that Respondents easily obtained a wedding cake from a different baker without issue. App. 5a, ¶ 6; App. 289-291a. Further, Respondents have not shown that there

is a shortage of bakers providing cakes for same-sex weddings or that abstaining from creating a custom wedding cake threatens the public safety, peace, or order of the State of Colorado.

Per CADA, the State of Colorado exempts certain localities used for religious purposes from compliance with its public accommodations law. 24-34-601(1)(a), C.R.S. 2014. In other sections of its statutory scheme, CADA also exempts religious employers from compliance with certain provisions. *See, e.g.*, 24-34-402(6) and (7). There is no constitutional reason why Respondents could not either 1) allow Petitioners a narrow exemption from CADA based solely on their sincerely held religious beliefs or 2) interpret CADA in a manner that does not violate Petitioners' First and Fourteenth Amendment freedoms.

Respondents have less drastic options available to achieve their stated goal, options that notably do not involve "stifl[ing] the exercise of [Petitioners'] fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). For example, if Respondents wish to ensure that individuals celebrating same-sex weddings can obtain a cake, Respondents could publicly post information pertaining to bakeries who hold no faith objections to participating in such an event. Creating a list and making it accessible would involve no material expense and, most importantly, would not involve violating the fundamental personal liberties of its citizens. They could also allow bakers needing to exercise religious conscience to refer clients to other bakers. One could reasonably conclude that the ready availability of simple alternatives and the refusal to implement them

demonstrates both Respondent's and the state's irrational animus toward religious people.

B. This Court's Precedent in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston* Requires Reversal.

The Colorado Court of Appeals ruling cannot be reconciled with this Court's holding in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568-81 (1995). In *Hurley*, this Court held that the First Amendment gave the organizers of a private St. Patrick's Day parade the right to exclude a homosexual group from the parade when the parade organizers believed that the group's presence would communicate a message about homosexual conduct to which they objected. *Id.* The First Amendment protected the parade organizers' right "not to propound a particular point of view," *id.* at 575, and this Court protected the "principle of speaker's autonomy," *id.* at 580. In doing so, this Court unanimously ruled that a State's public accommodations law must not be applied to compel a speaker to communicate an unwanted message or express a contrary viewpoint. This Court condemned the notion that public accommodation laws should force free individuals to express and convey particular messages to which they disagree because *"this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."* *Id.* at 573 (emphasis added).

The *Hurley* Court noted that, "this general rule, that the speaker has the right to tailor the speech, applies not only to expression of value or endorsement,

but equally to statements of fact the speaker would rather avoid," *id.* at 573, and the benefit of this rule is not limited to the press or just some people but is "enjoyed by business corporations generally." *Id.* at 574.[4]

Similar to the public accommodations law analyzed in *Hurley*, Colorado's public accommodation law, CADA, declares:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .

24-34-601(2)(a), C.R.S. 2014.

The Colorado Court of Appeals, like the lower court in *Hurley*, held that the Petitioners' abstinence from participation in an event to celebrate same-sex

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[4] The Colorado Court of Appeals held that Petitioners' creation of custom cakes and bakery items was not protected expression under the First Amendment. This conclusion of the lower court is wrong. The law recognizes cake creation and design as expression capable of intellectual property protection. *See, e.g.*, 17 U.S.C. § 102(a) (stating copyright protection subsists in "original works of authorship fixed in ***any*** tangible medium of expression, now known or later developed from which they can be perceived, reproduced, or otherwise communicated ... [and] include ... pictorial, graphic and sculptural works," such as custom wedding cakes.); U.S. Patent No. 550,927 (issued Sept. 18, 2007) (granting Cold Stone Creamery, Inc. a design patent for a combined ice cream and cake dessert).

relations, here a wedding ceremony, amounted to discrimination "because of . . . sexual orientation." App. 12-45a. Yet, this Court in later applying *Hurley*, noted that "the parade organizers did not wish to exclude the GLIB [*Irish-American Gay, Lesbian, & Bisexual Group of Boston*] members because of their sexual orientations, but because they wanted to march behind a GLIB banner." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653–54 (2000). In *Hurley*, the parade organizers did not seek to discriminate against homosexuals, but wished to communicate their St Patrick's Day message as they saw fit, without being compelled to adopt and promote other messages in their parade.

Like the parade organizers whose First Amendment rights this Court protected in *Hurley*, Petitioners do not, and have never, wished to discriminate against Respondents based on their sexual orientation. Instead, the record establishes that Petitioners would freely bake the Respondents birthday cakes or other baked goods for any number of reasons or occasions. Petitioners simply do not create expressions contrary to their Christian faith for *any* of their customers, whether that means, for example, refusing to bake a cake with a Halloween theme because it promotes a pagan holiday, or refusing to bake a cake with an untoward message for a bachelorette party because it comprises Petitioners' values, or refusing to bake a cake bearing a Nazi insignia because doing so promotes hatred. App. 282-284a, ¶¶ 57-58, 61-64. Given that Petitioners willingly serve those whose sexual orientation they disagree with, it is not their customers' sexual orientation that caused the denial of service in this case. Rather, it was solely the attempt

by these customers to compel Petitioners' participation in an event that violated Petitioners' rights of free expression, free exercise, and religious identity.[5]

Petitioners believe that all men are created equal, but they reserve the liberty to abstain from affirming that all conduct of men is equal—especially when participating in such a message violates the religious faith central to their identity. The First and Fourteenth Amendments afford Petitioners the liberty to not be forced or compelled by the State to do so. As this Court previously declared, "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

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[5] Indeed, this analysis confirms that, as a matter of logic, there is not even a rational basis for applying this statute in the manner the lower court has. Petitioners have not violated the purported dignity rights of same-sex oriented individuals that the statute expressly protects from discrimination. Petitioners consistently serve all customers willingly, regardless of their sexual orientation. Petitioners "discriminate" only in refusing to participate in events requested by any customer, regardless of sexual orientation, that violates Petitioners' religious beliefs and identities, and the statute does not prohibit that conduct.

III. THE LIBERTY RIGHT TO PERSONAL RELIGIOUS IDENTITY DEMANDS PETITIONERS BE FREE TO LIVE OUT THEIR RELIGIOUS IDENTITIES WITH IMPUNITY.

The Colorado Court of Appeals' ruling unconstitutionally infringes on the liberty and equal protection interests recognized by this Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).[6] In *Obergefell*, this Court acknowledged a constitutional right of personal identity for all citizens. *Id.* at 2593, 2597. This Court began its opinion by stating, "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Id.* at 2593. The majority of this Court held that one's right of personal identity precluded any State from proscribing same-sex marriage. The Court, however, did not limit the meaning of personal identity to only marital and sexual choices, but explained that the right extends to all personal choices central to one's dignity and autonomy. *Id.* at 2597 ("The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.").

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[6] *Amici* respectfully disagree that *Obergefell* was rightly decided and urge the Court to reverse that decision as an abrogation of Articles III and V of the Constitution, for the reasons stated in the dissenting Opinions in *Obergefell*. The arguments in this section are made in the (admittedly more likely) alternative.

This Court defined a fundamental liberty right as including "most of the rights enumerated in the Bill of Rights," and the right to religious identity and religious freedom is specifically enumerated in the Bill of Rights, enshrined in the free exercise and establishment clauses of the First Amendment. U.S. Const. amend. I. *Obergefell* furthermore held that this dignity right extends to "intimate choices that define personal identity and beliefs." *Obergefell*, 135 S. Ct. at 2597. This right of personal identity, therefore, applies not just to those who find their identity in their sexuality and sexual preferences, but also to citizens who define their identity primarily by their religious beliefs.

Recently this Court in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) held that "denying a generally available benefit solely on account of ***religious identity*** imposes a penalty on the free exercise of religion." *Id.* at 2019 (emphasis added). The concept of "religious identity" was recognized twice in the majority opinion of this Court and also in the concurrences of Justice Gorsuch, Justice Thomas, and Justice Breyer. *Id.* at 2019, 2024, n. 3, 2025, 2026. And this Court in *Obergefell* specifically noted that adherence to divine precepts and religious principles (*i.e.*, religious identity) is "central" to the "lives and faiths" of religious individuals. *Obergefell*, 135 S. Ct. at 2607.

Many Christians, like Petitioner Jack Phillips, find their identity in Jesus Christ and the ageless, sacred tenets of His Word memorialized in the Holy Bible. For followers of Jesus Christ, adhering to His commands is *the* most personal and central choice to define their individual dignity and autonomy. Christians, whose

identity inheres in their religious faith, are entitled to at least as much constitutional protection as those who find their identity in their sexual orientation. There can be no doubt that the right of personal identity protects against government authorities who use public policy to persecute, oppress, and discriminate against Christians and their religious identity.

Although it vigorously protected Respondents' "dignity" rights, the lower court unfairly neglected the same rights held by Petitioners. It may well be that Respondents felt offended by Petitioners' refusal to participate in their ceremony. But Petitioners certainly felt at least as offended at the suggestion that they should do so, especially because their religious convictions were ultimately adjudged to be not only insignificant, but hateful. It appears unwise, at best, to read *Obergefell's* dignity right as bestowing on one group the power to coerce compliance by another, especially in violation of the latter's free speech and religious convictions. Whatever the basis of this dignity or identity right might be, one of its boundaries must be that it can compel tolerance at most, but it cannot coerce another's endorsement or participation, for that would constitute a complementary infringement of the latter's dignity or identity right.[7] Such a reading of *Obergefell* would interpret CADA as

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[7] In *Obergefell*, this Court held that citizens' dignity rights could compel states to recognize their "same-sex marriages." But states do not have any competing dignity rights or other constitutional protections that free them from such compulsion. Petitioners and other citizens do. Thus, when faced with competing citizens' claims of dignity or identity, the Court may recognize a tolerance/promotion distinction without contradicting *Obergefell*.

exempting Petitioners from its reach, thus preserving its facial constitutionality.

But if that principle does not apply here and the Court is to judge which party has the better right to direct the actions of the other in order to preserve its dignity, it must be Respondents' dignity that gives way to Petitioners'.

Obergefell indicates that the basis for legal rules, such as CADA, is the protection of Respondents' "dignity" or "identity" right. As applied to this case, that alleged right is based on an affront to Respondents' dignity when Petitioners refused to participate in their same-sex marriage ceremony. In short, Respondents' dignity was offended by Petitioners' refusal to be coerced. This refusal was mistakenly[8] said to be premised on Respondents' sexual orientation. Hence, the State held that Petitioners violated CADA.

But as *Obergefell* held, Petitioners have a dignity or identity right to their own moral, political, social, and scientific orientations that oppose such ceremonies as immoral attacks on true marriage. This right exists independent of their religious convictions and identity. Irrespective of their religious inclinations, they are just as free to premise their identities on an ideal that respects the natural distinctions of the sexes and the established meaning of marriage as Respondents are to premise theirs on a competing idea.

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[8] See Section II.B., *supra*, citing App. 282-284a, ¶¶ 57-58, 61-64 (clearly evidencing Petitioners' lack of sexual orientation animus).

In the same respect, Petitioners have a separate speech-based dignity right to manifest that identity—and to not be forced to contradict that identity—through their words and other expressive conduct.[9]

The State action here unconstitutionally infringes on the personal identity, liberty, and equal protection rights this Court established in *Obergefell*. *Id*. at 2607. According to *Obergefell*, beyond the free speech and religious liberty protections expressly enshrined in the Bill of Rights, the substantive due process right to personal identity now must also provide Christians and other religious persons additional constitutional protection of their religious identity. The government must not only avoid compelling a religious citizen to participate in acts or events contrary to his or her freedoms of expression and religious conscience, but it must also refrain from violating the personal identity rights secured by substantive due process. Therefore, in addition to violating the Petitioners' First Amendment freedoms, the Colorado Court of Appeals' ruling violates the Petitioners' right to religious identity as articulated by this Court in *Obergefell*.

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[9] It is noteworthy that Respondents (and everyone else) would search in vain for any precedent allowing a prohibition on free speech based on its "offensive" content. This raises an interesting question: "[W]hy should we further limit religious liberty based on dignitary harms given that we refuse to limit speech on that basis at all. Why the double standard of counting dignitary harms against religion, but never speech?" J. Corvino, R. Anderson, & S. Girgis, Debating Religious Liberty and Discrimination, 251-52 (Oxford University Press, 2017) (emphasis omitted).

IV. THE CASE LAW RESPONDENTS RELY UPON IS DISTINGUISHABLE AND CONTRADICTS THE VAST MAJORITY OF PRECEDENT REQUIRING THE PROTECTION OF PETITIONERS' RELIGIOUS LIBERTY.

Respondents cite to inapposite and non-controlling cases to support their proposition that courts have "denied claims that religious freedom entitles individuals or businesses to discriminate." Resp. to Pet. at 40-41. Respondents' argument fails for two reasons.

First, Respondents' argument rests on the false premise that the Petitioners discriminate against Respondents due to their sexual orientation. Petitioners do not. As the record reflects, the Petitioners willfully provide their products and bakery creations to customers of all sexual orientations. App. 287a, ¶¶ 78, 79. Petitioners simply "discriminate" in the selection of their own moral actions; specifically, Petitioners discern in which events, activities, and creations they can participate while adhering to their sincerely held religious beliefs. App. 281-284a, ¶¶ 50-59, 61, 63-64. The First and Fourteenth Amendments allow individuals in our free society this discernment.

Second, none of the cases used by Respondents to forward their argument is persuasive. In *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990), the Fourth Circuit held that the Free Exercise Clause did not provide a defense for non-compliance with the Fair Labor Standards Act ("**FLSA**"). Defendants asserted that the Free Exercise Clause allowed them to pay employees less than minimum wage and to pay female employees less than

their male counterparts. The factual record showed, however, that defense witnesses testified their religious beliefs mandated no such practices. *Id.* at 1397. Defense witnesses testified that "the Bible does not mandate a pay differential based on sex" and that no other doctrine followed by the defendants mandated unequal pay. *Id.* Likewise, in *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986), the Ninth Circuit found that the employment practices at issue, offering unequal benefits programs to their male and female employees, did "not interfere with [defendant's] religious belief and only minimally, if at all, with the practice of religion. . . . [b]ecause the impact on religious belief or practice is minimal and the interest in equal employment opportunities is high." *Id.* at 1369. Both cases differ from the case before this Court as CADA requires Petitioners to create an expression to celebrate a same-sex wedding, and creating and participating in the event directly violates Petitioners' sincerely held religious beliefs.

In *Fields v. City of Tulsa*, 753 F.3d 1000 (10th Cir. 2014), the Tenth Circuit rejected the plaintiff's free exercise claim solely based on the court's interpretation of fact. The Plaintiff, a police captain, alleged that his superior ordered his attendance at a religious event held at a mosque where the plaintiff would face religious indoctrination. *Id.* at 1004. The court interpreted the "Attendance Order" as not burdening the plaintiff's free exercise of religion because "no reasonable jury could find that Attendance Order required Fields personally to attend the event." *Id.* at. 1009. The court found that plaintiff could ask other officers to attend the event without implicating his religious beliefs. *Id.*

In *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), a university brought suit complaining that the federal government's revocation of its tax-exempt status violated the Free Exercise Clause. The university historically banned African Americans from attending the school and implemented a policy forbidding interracial dating. *Id.* at 577-83. This Court in *Bob Jones University* explicitly limited its holding to racial discrimination in education. *Id.* at 592-97, 604, n.29. *Bob Jones University* examined "racially discriminatory admissions standards" and did not implicate religious speech or religious expression. *Id.* at 577. When this Court decided *Hurley* twelve years later, this Court did not expand its holding in *Bob Jones University* to deny private liberty rights in the narrow instances where a State or local government enforces its public accommodations law as conflicting with sincerely held religious freedom. 515 U.S. 557, 568-81 (1995). Respondents' reliance on *Brown v. Dade Christian Schs., Inc.*, 556 F.2d 310, 311 (5th Cir. 1977) fails for the same reasons.

And *Newman v. Piggie Park Enterprises, Inc.* is also distinguishable. 256 F. Supp. 941 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968). In *Newman*, restaurant owners categorically refused to provide service to African Americans due to invidious racial discrimination, whereas the Petitioners happily serve customers of all sexual orientations but simply cannot participate in celebrations or events that run contrary to their religious convictions. The free exercise claim in *Newman* was only analyzed by the district court, where the court gave no weight to the factual validity of defendants' argument that their faith actually required them to oppose racial integration. *Id.*

at 945. The appellate court also described the defendants' religious exercise defense as "patently frivolous." *Newman v. Piggie Park Enterprises, Inc.*, 377 F.2d 433, 437 (4th Cir. 1967) (Winter, Cir. J., concurring). Conversely here, the Petitioner's religious convictions are sincere and well-evidenced.

Similar arguments were raised before this Court in *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2760, which held RFRA required an accommodation from a federal mandate for business owners whose sincerely held beliefs prohibited facilitation of or participation in insurance that provided abortion-causing drugs, services, and mechanisms, despite arguments that an accommodation resulted in gender discrimination. *See also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993) (opposition to abortion "does not remotely qualify" as "invidiously discriminatory animus" toward women or "for such derogatory association with racism," even though only women obtain abortions). This strain of argument failed then and it should now. American jurisprudence does not support it. The rich history of this Court supports allowing the Petitioners the liberty and autonomy that free religious exercise and free speech require. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751; *Hurley*, 515 U.S. 557; *Cantwell*, 310 U.S. 296; *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520; *Barnette*, 319 U.S. 624; *Thomas*, 450 U.S. 707; *Yoder*, 406 U.S. 205; *Wooley v. Maynard*, 430 U.S. 705.

CONCLUSION

This Honorable Court should vacate and reverse the rulings of the Colorado Court of Appeals in order to uphold and protect the liberty rights promised to all Americans by the First and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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